IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1978

NO. 78-740

CECIL D. ANDRUS, SECRETARY of the INTERIOR, ET. AL., Appellants

v.

L. DOUGLAS ALLARD, ET. AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM

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Appellants' Jurisdictional Statement presents the anomalous position of demonstrating the "substantial nature of the questions presented" (Jurisdictional Statement, Page 8) while premising the Statement upon the position that "substantial questions" do not exist.

In presenting this Motion, Appellees intend not to brief nor answer the substantive argument of the Appellants relating to the merits of the decision on appeal, but desire that this Court note its probable jurisdiction pursuant to 28 U.S.C. §1253 and affirm the decision on appeal from the United States District Court for the District of Colorado as being manifestly correct.

I. THIS COURT HAS JURISDICTION FOR DIRECT APPEAL AS SUBSTANTIAL CONSTITUTIONAL QUESTIONS WERE PRESENTED AND A THREE-JUDGE PANEL FOR THE DISTRICT COURT OF THE DISTRICT OF COLORADO WAS PROPERLY CONVENED.

Appellants' statement that "If this Court has jurisdiction, the questions are substantial" (Jurisdictional Statement, Page 8) is a truism to which there can be no objection. Appellees urge, however, that this Court note its probable jurisdiction <u>because</u> substantial constitutional questions have been presented and a three-judge District Court panel was therefore required and properly convened pursuant to 28 U.S.C. §2282.

Plaintiffs are the owners of, dealers in, and appraisers of American Indian artifacts,

which artifacts are comprised in part of the feathers of various birds now included within the protection of the Migratory Bird Treaty Act, 16 U.S.C. §703, et seq, and Eagle Protection Act, 16 U.S.C. §668 (hereafter "Acts"). The artifacts were created and lawfully owned prior to the effective date of Federal protection of birds within the Acts.

Two of the Plaintiffs have previously been criminally prosecuted under the Acts for the sale or offering for sale of their pre-existing American Indian artifacts. Each of the Plaintiff's personal collection of feathered Indian artifacts has a value in excess of $10,000.00 and, in fact, such collections represent the culmination of each Plaintiff's professional career of collecting and dealing in American Indian art.

Appellees' ownership of American Indian art and lawful occupations of dealing in American Indian artifacts have been substantially eliminated by the broad enforcement and interpretation of the Acts by the Appellants, the United States Fish and Wildlife Service and the Department of the Interior.

The Acts, as enforced and interpreted by the Appellants, have proscribed <u>all</u> valuable uses of the Appellees' property and have the effect of outlawing a substantial part of the native

cultural heritage of this country. Private sales and exchange are outlawed and collecting is, therefore, essentially a prohibited activity. Museums and public institutions are similarly limited in their actions as private owners cannot sell or exchange their collections.

The constitutional challenges of the Acts brought by the Appellees were the following:

1. As all valuable uses of the property of the Plaintiffs have been denied by the Appellants and as each of the Appellee's lawful occupation was restricted by the Department of the Interior, the Acts were challenged as "taking" of property without compensation under the Fifth Amendment to the Constitution of the United States.

2. The Acts and regulations which, at the time of the filing of this action, did not define the birds which were within the protection of the Acts, were challenged as vague and indefinite statutes in violation of the Fifth Amendment to the Constitution of the United States.[1]

[1]Appellees' Complaint was filed September 19, 1975, at which date Title 50 of the Code of Federal Regulations, Part 10, was not a definitive list of the birds within the protection of the Migratory Bird Treaty Act. Substantial questions due to the variation and indefiniteness of the ornithological terms utilized by the treaties and conventions as the operative terms of the Acts were presented. By amendment to Part 10, Title 50 of the Code of Federal Regulations effective November 17, 1977, the vagueness, and ambiguity of the identity of protected birds was clarified. The claim of vagueness, having been satisfied by the definity of the revised Regulations of November 17, 1977, was not presented for the consideration of the District Court and is not an issue on appeal.

As the Appellees did not believe that the Acts themselves applied to pre-existing artifacts and recognizing the judicial principal of interpreting an act so as to avoid the necessity of determining a constitutional challenge, the Appellees additionally urged that the Acts be interpreted so as to apply prospectively from the date of enactment and not be applied to pre-existing, lawfully acquired, and valuable property. Inclusion of the non-constitutional ground does not impair the jurisdiction of the three-judge court to hear the case nor the direct appellate jurisdiction of the United States Supreme Court. Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 4 L.Ed.2d 568, 80 S.Ct. 568 (1960).

Injunctive relief prohibiting the enforcement of the Acts against the property of the Appellees was sought and a permanent injunction has issued.

"Constitutional insubstantiality" for the purpose of noting probable jurisdiction on appeal from a three-judge panel has been equated with such concepts as "essentially fictious", "wholly insubstantial", "obviously frivolous", and "obviously without merit." Goosby et al v. Osser

et al, 409 U.S. 512, 35 L.Ed.2d 36, 93 S.Ct. 854 (1973). The challenges of the Appellees whose property has been rendered valueless and whose professional careers have been limited cannot be characterized as having presented constitutional questions which were "insubstantial."

Citing earlier decisions, this Court in Goosby, supra, at page 518, has further stated that a claim is insubstantial only if

> "'"Its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and to leave no room for the inference that the questions sought to be raised can be the subject of controversy."'"

No decision of this Court has determined the constitutionality of the Acts if applied to previously existing and lawfully acquired American Indian artifacts, nor has this Court considered the constitutional application of similar conservation acts as such acts may relate to pre-existing materials (Acts such as the Marine Mammal Protection Act, 16 U.S.C. §1361, et seq., to be sure, provide for the exclusion of pre-existing materials or provide for permits for pre-existing artifacts and thus are fundamentally distinguished from the Acts in question).

Appellants do not deny that all valuable uses left to the Appellees' property are foreclosed by enforcement of the Acts and

continue to assert that such destruction of value is the intent of the Acts so as to preserve existing wildlife from illegal takings (Jurisdictional Statement, Pages 12-13).

Destruction of all of the value of the Appellees' property and limitation of their professional careers presents a catastrophic loss to the individuals involved and cannot be deemed frivolous.

That two of the Appellees have been prosecuted under the Acts for the sale of pre-existing American Indian artifacts and that the threat of continued prosecutions is presented if the Acts were to be upheld as interpreted by the Appellants manifests that substantial questions as to the constitutionality of the Acts are presented. Gunn, et al v. University Committee to End the War in Viet Nam, et al, 399 U.S. 383, 26 L.Ed.2d 684, 90 S.Ct. 2013 (1970); see also Annotation, 'CONSTRUCTION AND APPLICATION OF 28 U.S.C. §1253 PERMITTING DIRECT APPEAL TO SUPREME COURT FROM ORDER OF THREE-JUDGE DISTRICT COURT GRANTING OR DENYING INJUNCTION', 26 L.Ed.2d 947.

The continued interpretation and expansion of the Acts to include pre-existing artifacts notwithstanding judicial precedent directly contrary and no precedent supporting the Appellants, provides further evidence of the

substantial nature of the questions presented and the necessity for the injunctive relief sought by the Appellees and granted by the Court. The four cases referred to are:

1. Informations, In re Under Migratory Bird Treaty Act, 281 F.546 (D. Mont. 1922);

2. United States v. Fuld Store Company, 262 F.836 (D. Mont 1920);

3. United States v. Marks, 4 F.2d 420 (SD.Tex.1925);

4. United States v. Aitson, (10th Cir. unpublished, July 21, 1975, No. 74-1588).

See also A. E. Nettleton Co. v. Diamond, 315 NY.Sup.2d 625, 264 N.E.2d 118 (1970), appeal dismissed 401 U.S. 969 (1971).

Finally, in determining whether substantial constitutional questions have been raised concerning the "taking" of valuable property rights of the Appellees, the difficulty of determining the appropriate test for when "justice and fairness" require that economic injuries caused by public action be compensated by the Government rather than remaining disproportionally concentrated on a few persons has been recently expressed by this Court in Penn Central Transportation Co., et al, v. City of New York, et al, 46 LW 4856 (June 26, 1978, No. 77-444). See also Goldblatt v. City of Hempstead 369 U.S. 590, 8 L.Ed.2d 130, 82 S.Ct. 987

(1962). The determination depends largely upon the particular circumstances of the case presented and must be resolved on an ad hoc basis.

The lawful acquisition of pre-existing American Indian artifacts by the Appellees is not an issue. The destruction of all value of Appellees' property by the enforcement of the Acts is admitted. The catastrophic impact of the Acts upon the property and livelihood of the Appellees has been established. The necessity of seeking declaratory and injunctive relief to effectuate prior judicial determinations against the contrary enforcement of the Acts by the Appellants is apparent.

There being no prior judicial determination from this Court concerning the constitutionality of the Acts as related to valuable pre-existing American Indian artifacts nor any similar determination pursuant to other conservation acts, and the judicial test of "fairness" to be determined by the circumstances of each case, all suggest that "substantial" constitutional questions have been presented.

This Court should, therefore, note its probable jurisdiction on appeal pursuant to 28 U.S.C. §1253.

II. THE DECISION OF THE THREE-JUDGE PANEL OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO SHOULD BE AFFIRMED ON THE GROUNDS THAT IT IS MANIFESTLY CORRECT.

The District Court construed the Acts so as to apply prospectively from the date of enactment. The decision is based upon prior judicial precedent (Opinion, Appendix A, Jurisdictional Statement, Pages 6a-8a); balancing the reasonable necessity of the drastic measures urged by the Appellants against the impact falling upon the Appellees (Opinion, Appendix A, Jurisdictional Statement, Pages 11a-13a); reviewing the confiscatory effect upon the Appellees' property, if given the scope urged by the Appellants (Opinion, Appendix A, Jurisdictional Statement, Pages 12a-13a); considering the legislative intent in re-enacting the Acts following judicial constructions that the Acts applied only to birds and parts thereof taken after Federal protection had been afforded (Opinion, Appendix A, Jurisdictional Statement, Pages 12a-13a); and adopting the accepted judicial standard of construing a statute so as to avoid the necessity of determining the constitutional challenge that otherwise is presented (Opinion, Appendix A, Jurisdictional Statement, Page 13a). The determination of the District Court in construing the Acts not to

apply retrospectively is manifestly correct and should be affirmed.

The language of the Migratory Bird Treaty Act, particularly, demonstrates that lawfully acquired feathered American Indian artifacts are not within the proscription of the Act.

Section 2 of the Migratory Bird Treaty Act, as amended, 16 U.S.C §703 (Jurisdictional Statement, Appendix A, Page 23a) does not itself define protected birds, but refers instead to the various treaties between the United States and foreign countries. The Convention between Japan and the United States concluded March 4, 1972 (25 U.S.C. §3329), contrary to the statement of Appellants at page 15 of the Jurisdictional Statement, specifically restricts the inclusion of protected birds and bird products to those which have been "taken illegally." Article III, Section 1, of the Convention provides:

> "The taking of the migratory birds or their eggs shall be prohibited. Any sale, purchase, or exchange of these birds or their eggs, taken illegally, alive or dead, and any sale, purchase, or exchange of the products thereof or their parts shall also be prohibited." [Emphasis Supplied.]

By adopting the Convention as the operative term of the Migratory Bird Treaty Act, Congress has specifically restricted the inclusion of the Act relating to the Convention with Japan to

parts of birds which were taken illegally after the effective date of Federal protection.

The specific language and the legislative history of the re-enactment of the Migratory Bird Act in 1974 similiarly show that it was not the legislative intent of Congress to include historic American Indian artifacts within the Act.

Mr. Nathanial Reed, Assistant Secretary of the Interior, a party Appellant, provided the official agency comment of the Department of the Interior, for the consideration of the Committee on Commerce relating to the 1974 amendment to the Migratory Bird Act:

> "The Convention contains a provision that prohibits the taking of migratory birds or their eggs. It also prohibits the sale, purchase, or exchange of these birds or their eggs, taken illegally, alive or dead, and the products thereof or their parts. Neither the Migratory Bird Treaty Act nor the bill as introduced, contained language prohibiting the taking, sale, purchase or exchange of products therefrom. Consequently, H.R. 10942 was amended by the House to make it clear that the prohibition applied also to any product of any such bird, egg or part thereof." [Emphasis Supplied.] U.S. Code, Congressional and Administrative News, 93rd Congress--Second Session, 1974, Vol.2, p. 3254.

The Senate report for Public Law 93-851, the

1974 amendment to the Migratory Bird Treaty Act, set forth identical construction with that stated by Mr. Reed. (U.S. Code, Congress. and Admin. News, supra at p. 3250.)

In amending and re-enacting the Act following judicial construction limiting the Acts' applicability relating to pre-existing property and as the Acts themselves do not specifically include pre-existing property, it is to be presumed that the legislature was familiar with the existing construction and enacted the statutes in light of the judicial precedent. See Blake v. McKim, 103 U.S. 336, 26 L.Ed. 563, 13 Otto 336; District of Columbia v. Murphy, 314 U.S. 441, 86 L.Ed. 329, 62 S.Ct. 303.

The Appellants' citations of U.S. v. Richards, 583 F.2d 491 (10th Cir. August 23, 1978, No. 77-1603); United States v. Species of Wildlife, 404 F.Supp. 1398 (E.D. NY 1975); and United States v. Kepler, 531 F.2d 796 (6th Cir., 1976) ; not only fail to support the intended position that the questions presented in this action have been foreclosed by other decisions and are therefore no longer "substantial questions", but such cases are fundamentally distinguished from the circumstances presented.

Richards, supra, a decision of the United States Court of Appeals, 10th Circuit, was decided subsequent to the determination of the

District Court in this action. Richards itself distinguishes the decision therein provided from the panel's determination in this action. The limited property rights acquired by the defendent Richards who obtained his living birds pursuant to permits not providing for subsequent sale is fundamentally distinguished from having lawfully acquired property rights without permit or limitation and which rights are thereafter foreclosed.

In Kepler, supra, the United States Court of Appeals, Sixth Circuit, carefully delimited the scope of the Endangered Species Act of 1973 therein being considered as not extending to intrastate sales. As obvious value was thus left to the defendant Kepler, the restriction on interstate sales and foreign commerce is essentially distinguished from the Acts in this case which foreclose all sales, thus creating a confiscatory effect not present in Kepler.

In Species of Wildlife, supra, the Court referred to a permit system which could have been availed upon by the owner of the confiscated specimen. The Acts in this action, as enforced by the Appellants, do not provide for any commercial permits.

In each of the cases cited by the Appellants, the inquiry of the Court has ascertained that through exceptions, exclusions,

permits or due to limitations on the rights of owners existing prior to the acquisition of property, "takings" were avoided and the statutes enforced.

The District Court panel, as noted, adopted the judicial constraint of interpreting the Acts so as to avoid the necessity of condemning them as unconstitutional. See United States v. Johnson, 323 U.S 273, 89 L.Ed. 236, 65 S.Ct. 249 (1944); Regional R il Reorganization Act cases, 419 U.S. 102, 42 L.Ed.2d 320, 95 S.Ct. 335 (1974). If such a construction, permitting reasonable regulations to be adopted, were not approved, the invalidity of the Acts as "takings" of property in violation of the Fifth Amendment to the United States Constitution, could not be avoided.

Paralleling the tests suggested by this Court in Penn Central Transportation Company, et al., supra, the constitutional invalidity of the Acts if applied to pre-existing artifacts is established.

In Penn Central, the owner of the property was left numerous valuable options:

1. A "reasonable rate of return" on the property was to be permitted.

2. An administrative process for allowing desired uses or in some instances permitting exemptions due to hardship was available.

3. Development rights allocated to the restricted property could be transferred to other properties of the owner and value realized.

The restrictions upheld in Penn Central were therefore consistent with previous zoning determinations that, while the most valuable use of property can be prohibited without compensation, some valuable uses must be permitted to remain.

The Acts in question in this action are intended to and do prohibit all valuable uses of whatever nature for the property of the Appellees; Appellees' ability to dispose of their property for any value whatever has been denied.

The Appellees have acquired and dealt in collections of American Indian artifacts with distinct investment-backed expectations. Acquiring and disposing of such artifacts is, indeed, their entire professional life. The economic impact of the Acts upon the property and rights of the Appellees is thus of particular significance.

The Acts prohibit the disposition of the Appellees' property for any value whatever. This critical distinction is contrary to one of the fundamental reservations of property rights considered by this Court in Goldblatt, supra.

The property of the Appellees has been made "wholly useless" placing the Acts within the

condemnation of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 67 L.Ed. 322, 43 S.Ct. 158 (1922), and Hudson Water Co. v. McCarter, 209 U.S. 349, 52 L.Ed. 828, 28 S.Ct. 529 (1908)

The Acts in question have as their laudible goal, the preservation of existing wildlife. Appellees do not challenge that their aim is for a proper public purpose, nor do Appellees claim any right whatsoever in owning or dealing in any bird or bird product taken illegally. The Appellees make no claim that they should be permitted to be free from reasonable permits or regulations such as those provided by similiar wildlife conservation acts exemplified by the Marine Mammal Protection Act, supra.

If the Acts are found to apply to lawfully acquired pre-existing artifacts, however, traditional notions of "justice and fairness" require that the economic injury caused by the public action not remain concentrated on the few, but such disporportionate affect be distributed among all by way of fair compensation, if the public purpose could not be realized through less drastic regulation.

CONCLUSION

The Court should note its probable jurisdiction for the appeal from the District Court for the District of Colorado and affirm the

decision as manifestly correct.

RESPECTFULLY SUBMITTED,

AKOLT, DICK AND AKOLT

John P. Akolt, Jr.

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DECEMBER 1978